APPENDIX — EXCERPTS OF AGREEMENT AND PLAN OF MERGER AND REORGANIZATION

AGREEMENT AND PLAN OF MERGER AND REORGANIZATION

This AGREEMENT AND PLAN OF MERGER AND REORGANIZATION ("*Agreement*") is maded and entered into as of June 2, 2000, by and among: MAXIM PHARMACEUTICALS, INC., a Delaware corporation ("*Parent*"); M-80 ACQUISITION CORP., a Delaware corporation and a wholly owned subsidiary of Parent ("*Merger Sub*") and CYTOVIA, INC., a Delaware corporation (the "*Company*"). Certain capitalized terms used in this Agreement are defined in Exhibit A.

* * *

1.5 Conversion of Shares.

(a) Subject to Sections 1.8(a) and 1.9, at the Effective Time, by virtue of the Merger and without any further action on the part of Parent, Merger Sub, the Company or any stockholder of the Company:

(i) except as provided in Section 1.5(a)(ii), each share of the common stock, par value $.001 per share of the Company (the "*Company Common Stock*"), outstanding immediately prior to the Effective Time shall be converted into the right to receive that fraction of a share of the common stock, par value $.001 per share of Parent ("*Parent Common Stock*") equal to the Exchange Ratio (as defined in Section 1.5(b)(i));

(ii) any shares of Company Common Stock then held by the Company or held in the Company's treasury shall be canceled and retired and shall cease to exist, and no consideration shall be delivered in exchange therefore; and

(iii) each share of the common stock of Merger Sub outstanding immediately prior to the Effective Time shall be converted into one share of common stock of the Surviving Corporation.

* * *

exercise any such repurchase option or other right set forth in any such restricted stock purchase agreement or other agreement.

1.6 Company Options and Warrants. At the Effective Time, each then outstanding Company Option or Company Warrant, whether vested or unvested, shall be assumed by Parent in accordance with the terms (as in effect as of the date of this Agreement) of the Company Stock Option Plan under which such Company Option was issued, if any, and the stock option agreement or warrant agreement by which such Company Option or Company Warrant is evidenced. To the extent that any Company Options are incentive stock options, within the meaning of Section 422 of the Code, the provisions of this Section 1.6 shall be interpreted and applied so as to comply with the requirements of Section 424(a) of the Code, so that such Company Options shall continue to qualify as incentive stock options after their assumption by Parent. All rights with respect to Company Common Stock under outstanding Company Options or Company Warrants

shall thereupon be converted into rights with respect to Parent Common Stock. Accordingly, from and after the Effective Time, (a) each Company Option or Company Warrant assumed by Parent may be exercised solely for shares of Parent Common Stock, (b) the number of shares of Parent Common Stock subject to each such assumed Company Option or Company Warrant shall be equal to the number of shares of Company Common Stock that were subject to such Company Option or Company Warrant immediately prior to the Effective Time multiplied by the Exchange Ratio, rounded down to the nearest whole number of shares of Parent Common Stock, (c) the per share exercise price for the Parent Common Stock issuable upon exercise of each such assumed Company Option or Company Warrant shall be determined by dividing the exercise price per share of Company Common Stock subject to such Company Option or Company Warrant, as in effect immediately prior to the Effective Time, by the Exchange Ratio, and rounding the resulting exercise price up to the nearest whole cent, and (d) all restrictions on the exercise of each such assumed Company Option or Company Warrant shall continue in full force and effect, and the term, exercisability, vesting schedule, acceleration rights and other provisions of such Company Option or Company Warrant shall otherwise remain unchanged. The Company and Parent shall take all action that may be necessary (under all Company Stock Option Plans and otherwise) to effectuate the provisions of this Section 1.6. Parent shall file with the SEC, within 90 days after the Closing Date, a registration statement on Form S-8 registering the exercise of the Company Options assumed by Parent pursuant to this Section 1.6.

* * *

Appendix

10.14 Parties in Interest. Except for the provisions of Sections 1.5 and 1.6, none of the provisions of this Agreement is intended to provide any rights or remedies to any Person other than the parties and their respective successors and assigns (if any).

* * *

10.18 Negotiations of Disputes. If a dispute arises between the parties relating to the interpretation or performance of this Agreement, including any right of setoff, and the parties cannot resolve the dispute within 30 days of a written request by either party to the other, such dispute shall be referred to the Chief Executive Officer, Chief Financial Officer or General Counsel of Parent and Chief Executive Officer, Chief Financial Officer or General Counsel of the Company for resolution. Such persons shall hold a meeting to attempt in good faith to negotiate a resolution of the dispute prior to pursuing other available remedies. If within 10 business days after such meeting, the Chief Executive Officer, Chief Financial Officer or General Counsel of Parent and the Chief Executive Officer, Chief Financial Officer or General Counsel of the Company have not succeeded in negotiating a resolution of the dispute, such dispute may be resolved through arbitration pursuant to Section 10.19.

10.19 Arbitration. Disputes that have not been successfully resolved pursuant to Section 10.18, with the exception of any claim for a temporary restraining order or preliminary or permanent injunctive relief to enjoin any breach or threatened breach hereof, shall be settled by a panel

of three arbitrators with such arbitration to be held in San Diego, California, in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. All arbitrators must be knowledgeable in the subject matter at issue in the dispute. The arbitrators shall make their decision in accordance with the terms of this Agreement and applicable law. Each party shall initially bear its own costs and legal fees associated with such arbitration and the parties shall split the cost of the arbitrators. The prevailing party in any such arbitration shall be entitled to recover from the other party the reasonable attorneys' fees, costs and expenses incurred by such prevailing party in connection with such arbitration. The decision of the arbitrators shall be final and may be sued on or enforced by the party in whose favor it runs in any court of competent jurisdiction at the option of the successful party. The rights and obligations of the parties to arbitrate any dispute relating to the interpretation or performance of this Agreement or the grounds for the termination thereof, shall survive the expiration or termination of this Agreement for any reason. The arbitrators shall be empowered to award specific performance, injunctive relief and other equitable remedies as well as damages, but shall not be empowered to award punitive or exemplary damages or award any damages in excess of any limitations set forth in this Agreement.

* * *

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

No. 04-1590

IN THE

Supreme Court of the United States

MAXIM PHARMACEUTICALS, INC.,
LARRY STAMBAUGH and KURT GEHLSEN,

Petitioners,

v.

CROSSPOINT VENTURE PARTNERS 1997, L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT

REPLY BRIEF

CHARLES H. DICK, JR.
KATHERINE A. BACAL*
BAKER & MCKENZIE LLP
101 West Broadway
12th Floor
San Diego, CA 92101
(619) 236-1441

* *Counsel of Record*

Counsel for Petitioners

196088

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page *ii* of Petitioner's Opening Brief, and there are no amendments to that Statement.

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I. INTRODUCTION

The Petition presents three questions appropriate for this Court's review. By their silence, Respondents impliedly concede the second two of these three questions. Respondents also do not directly respond to the first question presented by the Petition, asserting instead their own alternative questions. Respondents claim (incorrectly) that (1) the scope of the applicable arbitration provision is not a federal question; (2) no Circuit conflict is presented because the Ninth Circuit consistently applies its construction of the Federal Arbitration Act; and (3) there are alternative state law grounds for the appellate court's decision.

The Opposition fails to address the wealth of authority cited in the Petition. These cases confirm that the Petition presents a federal question: whether a fraudulent inducement or related tort claim can be encompassed by less than the broadest arbitration provision.[1] The cases cited in the Petition further demonstrate that there is a well-developed conflict among Circuits as to how this federal question should be answered. The minority view — followed by the Ninth Circuit and the California Court of Appeal — refuses to compel arbitration of fraudulent inducement claims under subjectively "narrow" arbitration provisions. This minority view conflicts with the strong policy in favor of arbitration stated in numerous prior Supreme Court decisions. However, this Court has never

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[1] The Petition also presents the question of whether the appellate court properly reviewed the question of arbitrability when the parties voluntarily submitted this question to the arbitrators and the arbitration provision incorporates the AAA Rules. Because this question was not addressed in the Opposition, no additional arguments are presented on Reply.

addressed the precise question presented by the Petition.[2] Finally, the state appellate court itself stated that there was no alternative state law ground for its decision. This Court should therefore grant the Petition.

II. THE PETITION PRESENTS A FEDERAL QUESTION

It is beyond dispute that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, applies to transactions involving interstate commerce, such as the merger transaction between Maxim and Cytovia. Indeed, Respondents do not debate that the FAA applies to the arbitration provision in question.

In their Opposition, however, Respondents take contradictory positions as to whether the court below decided a federal question. Respondents argue, on the one hand, that the court below "decided no federal question." Oppo., p. *i*. On the other hand, Respondents argue throughout their brief that the state court ruled "under Ninth Circuit law." *Id*, *see also* p. 6 ("the opinion straightforwardly applies Ninth Circuit law") ("the court of appeal's decision did nothing more than correctly apply settled Ninth Circuit law to the dispute between these parties"); p. 8 ("The California appellate court properly applied Ninth Circuit law in determining the Cytovia Stockholder's tort claims are not arbitrable."). Respondents clearly do not dispute that the lower court based its decision on the Ninth Circuit's opinions. These opinions were constructions of federal law.

[2] Because of the Circuit conflict, Supreme Court Rule 10 is fully satisfied. In addition, many state courts of last resort follow the majority view that fraudulent inducement claims can be compelled even under narrow arbitration provisions. *See, e.g., In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 550-51 (Tex. 2002); and *A. Sangivanni and Sons v. F.M. Floryan and Co., Inc.*, 158 Conn. 467, 472-73 (1969). These decisions conflict with the Ninth and Second Circuits, thus establishing an alternative basis for satisfaction of Rule 10.

The crux of the opinion below was that the applicable arbitration clause was not broad enough to encompass Respondents' claims. This question as to the scope of the applicable provision is one of federal law. *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) ("Federal law in the terms of the Arbitration Act governs [arbitrability of a dispute] in either state or federal court."); *Tracer Research Corp. v. National Envtl. Services Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994), *cert. dismissed*, 515 U.S. 1187 (1995) ("the scope of the arbitration clause is governed by federal law"); *Bismarck v. Toltz, King, Duvall, Anderson & Assoc., Inc.*, 767 F.2d 429, 431 (8th Cir. 1985) ("Determining what claims fall within the class of disputes governed by an arbitration agreement is a question of federal law."); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971) ("The validity and interpretation of arbitration clauses affecting interstate commerce are governed by federal law.").

In rendering its decision, the California appellate court "assume[d] without deciding" that the FAA applies. Moreover, the appellate court cited to and relied exclusively on federal cases interpreting the FAA for its conclusion that the dispute was outside the scope of the applicable arbitration provision.

The lead Ninth Circuit case cited by the appellate court is *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983). In that case, the Ninth Circuit specifically held, "[f]ederal law therefore applies to our determination of the scope of this arbitration agreement." *Id.* at 1463. Respondents are simply mistaken when they contend that the Ninth Circuit applied California law in *Mediterranean*. Indeed, the court in *Mediterranean* further noted that neither party disputed the application of federal law. *Id.* at n. 4. In *Tracer*, the Ninth Circuit

similarly stated that "the scope of the arbitration clause is governed by federal law." *Tracer*, 42 F.3d at 1294.[3]

III. THE PETITION PROPERLY PRESENTS THE WELL-DEVELOPED SPLIT BETWEEN CIRCUITS

The Petition demonstrates that there is a conflict between the Circuits as to when a fraudulent inducement claim is subject to a contractual arbitration provision. Not only has this conflict developed, it is fully ripened.

Respondents respond by arguing that (1) the lower court's opinion was not published, and (2) there is no Circuit split because the opinion "straightforwardly applies Ninth Circuit law. . . ." Oppo., p. 6. Neither of these arguments carries any weight.

A. The Court Can And Should Review This Unpublished Opinion

It is well-established that an unpublished opinion may provide the basis for certiorari. *See, e.g., Kaupp v. Texas*, 538 U.S. 626, 629 (2003). In fact, the Court has at least twice recently granted certiorari of unpublished opinions by a California Court of Appeal after the California Supreme Court refused review (the situation at bar). *See Ewing v. California*, 538 U.S. 11, 20 (2003); *Perry v. Thomas*, 482 U.S. 483, 488-89 (1987) (reversing decision affirming the denial of a petition to compel arbitration).

Moreover, the fact that the lower court's opinion was unpublished actually supports review in this case. Such an unpublished decision gives no guidance to future litigants and therefore violates the strong federal policy in favor of arbitration. Other unfortunate litigants may again go through the process of

[3] Respondents fail to mention, let alone address, the Tracer decision.

compelling arbitration, having the appellate court deny an interlocutory appeal, arbitrating the matter, only to have their judgment reversed on appeal when the matter is deemed outside the scope of arbitration.

B. There Is A Well-Established Conflict Among Circuits Mandating Review

Respondents argue, in sum, that there is no Circuit conflict because the Ninth Circuit is internally consistent. In objecting to this Court's review, Respondents argue that the appellate court did not *create* a conflict of federal law. Of course, if the creation of a conflict were necessary, such conflict would never have time to fully ripen. In this case, the conflict at issue was not created by the California Court of Appeal, but its decision illustrates that such conflict is fully developed: the Ninth Circuit stands in a position out of step with most of the rest of the country, supported only most tenuously by the Second Circuit. The conflict is fully-ripened and ready for review.

Respondents' unsupported statement that "Maxim attempts to create a conflict where none exists," is simply untrue. As set forth in the Petition, over forty years ago the Second Circuit set down a rule under which "narrow" arbitration provisions — those limited to controversies related to interpretation and performance of a contract — do not encompass fraudulent inducement claims. *See In re Kinoshita*, 287 F.2d 951, 953 (2d Cir. 1961); *see also Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001) (under the Second Circuit rule, courts must first determine whether an arbitration clause is broad or narrow; narrow clauses do not encompass collateral matters).

Interestingly, Respondents mention *Kinoshita* only to make the point (as is stated in the Petition) that the Second Circuit

has not yet overruled it. Thus, though the Second Circuit has limited its holding to the precise facts of that case, district courts in the Second Circuit remain constrained to follow *Kinoshita* if they cannot distinguish a "narrow" arbitration clause. *See Bristol-Myers Squibb Co. v. SR Int'l Bus. Ins. Co.*, 354 F. Supp. 2d 499 (S.D.N.Y. 2005).

The Second Circuit rule has been adopted by the Ninth Circuit. *See Mediterranean Enters.*, 708 F.2d at 1463; *Tracer*, 42 F.3d at 1295. The California Court of Appeal has relied on the Ninth Circuit rule more than once. *See MHC Fin. Ltd. Partnership Two v. City of Santee*, 125 Cal.App.4th 1372, 1398 (2005) (explaining that the Ninth Circuit's rule means that a more narrow provision "encompasses only those actions directly involving the application of [the subject contract] in specific factual contexts addressed by the [the subject contract].").

In contrast to the Ninth and Second Circuits, a slew of other Circuits (cited in the Petition) have held that fraudulent inducement claims must be arbitrated even under provisions that require arbitration only of disputes "relating to the interpretation or performance" of an agreement—the exact language contained in the arbitration provision here.

Respondents claim that the Petition relies on cases in which the arbitration provision required arbitration only of matters "arising out of" or "arising under" a contract. Oppo., p. 10. In point of fact, the Ninth Circuit has held that an arbitration provision that uses the phrase "arising hereunder" is synonymous with one limited to disputes "relating to the interpretation or performance" of the contract. *Mediterranean Enters.*, 708 F.2d at 1464; *Tracer*, 42 F.3d at 1295.[4]

[4] This argument underscores one of the problems arising because of the Circuit conflict. Without a presumption of arbitrability of all (Cont'd)